DATO' SERI ANWAR IBRAHIM

v.

DATO' SERI DR MAHATHIR MOHAMAD

FEDERAL COURT, MALAYSIA
MOHAMED DZAIDDIN CJ
WAN ADNAN ISMAIL CJ (MALAYA)
ABDUL MALEK AHMAD FCJ
[APPLICATION CIVIL NO: 08-2-2001(W)]
23 FEBRUARY 2001

TORT: *Defamation - Slander - Defence - Justification - Convictions of third parties and facts admitted by them - Whether constituted a defence of justification - Whether appellate court right in holding so*

TORT: *Defamation - Slander - Defence - Qualified privilege - Whether on the authority of Lange v. Atkinson defence available to respondent - Whether appellate court right in not disturbing decision of trial judge*

CIVIL PROCEDURE: *Appeal - Leave to appeal - Leave to appeal to Federal Court - Prospects of success of appeal - Whether applicant had a prima facie case for success should leave be granted*

The applicant, Dato' Seri Anwar Ibrahim had instituted proceedings in the High Court claiming damages in the sum of RM100 million against the respondent, arising out of a press statement made by the respondent to a group of journalist which the applicant claimed to be defamatory of him.

The respondent pleaded justification and qualified privilege as defences to the applicant's claim.

In support of his defence of justification, the respondent relied on the convictions of two persons, a Dr Munawar Ahmad Anees ('Munawar') and a Sukma Darmawan Saasmitaat Madja ('Sukma') on charges that they had allowed the applicant to sodomise them. The respondent's contention was that these convictions had been widely published in all the local newspapers, some two days prior to the date when the respondent made the statement complained of to the journalists.

In support of the defence of qualified privilege, the respondent had relied on the vituperative attacks by the applicant on the respondent in person, on United Malay National Organisation (UMNO), the Government, the Attorney General and the Police Force and the respondent's right to a reply to such attacks as the chief executive of the Government.

The respondent also relied on the calls made on him by Non-Governmental Organisations and Opposition to explain the removal of the applicant as the Deputy President of UMNO and the Deputy Prime Minister of the nation.

Premised on these defences, the respondent had applied to the court to strike out the applicant's claim pursuant to O. 18 r. 19 of the Rules of the High Court 1980 ('RHC'). The judge of the High Court allowed the application.

The applicant's appeal to the Court of Appeal was dismissed. Hence, this application by the applicant pursuant to s. 96(a) of the Courts of Judicature Act 1964 ('CJA'), for leave to appeal to this court from the decision of the Court of Appeal.

The applicant sought leave on two questions, namely: (i) whether the Court of Appeal was right in holding the convictions of Sukma and Munawar and the admission of the facts read out in court by both of them could constitute a defence of justification in respect of the offending words meriting dismissal of the applicant's suit under O. 18 r. 19 RHC; and (ii) whether the Court of Appeal was right in relying on the principle in *Lange v. Atkinson* and concluding that the decision of the trial judge on the issues of qualified privilege should not be disturbed having regard to the application to strike out the applicant's suit being one under O. 18 r. 19 RHC.

Held:

Per Mohamed Dzaiddin CJ

[1] An assessment of the prospects of success, should leave be granted, is an important factor which the Federal Court would have to take into account in deciding whether or not leave to appeal to it should be granted pursuant to s. 96(a) CJA.

[2] The High Court judge had relied on the facts admitted and the confession as to the acts of gross indecency in the criminal cases involving Munawar and Sukma to found his finding that the words spoken by the respondent constituted justification.

[3] On qualified privilege, the High Court judge had applied the correct test and the law to the facts and circumstances of the case on the authority of *Lange v. Australian Broadcasting Corporation.*

[4] On the reasons and the conclusion of the judge of the High Court on the defences of justification and qualified privilege raised by the respondent in his defence, and on his application of the law relating to these defences to the "factual matrix" of the case, should leave to appeal be granted, the applicant would not have any prospect of success.

[5] It is not the practice of the Federal Court, following the English House of Lords, to give explicit reasons for the granting or the refusing of leave to appeal to it. However, reasons were given herein as there was a point of law of general principle not previously considered and decided by the Federal Court.

[Application for leave dismissed.]

Case(s) referred to:
Datuk Syed Kechik Syed Mohamed v. The Board of Trustees of the Sabah Foundation [1999] 1 CLJ 325 ***(refd)***
Lange v. Atkinson 3 NZLR [1988] 424 ***(refd)***
Lange v. Australian Broadcasting Corporation [1997] 189 CLR 520 ***(refd)***

Legislation(s) referred to:
Courts of Judicature Act 1964, s. 96(a)
Rules of the High Court 1980, O. 18 r. 19

For the applicant - Karpal Singh (Ramkarpal Singh with him); M/s Karpal Singh & Co
For the respondent - Mohd Adnan Shuaib (N Chandran with him); M/s Adnan Sundra & Low

[Appeal from Court of Appeal, Civil Appeal No: W-02-663-99]

Reported by Usha Thiagarajah

JUDGMENT

Mohamed Dzaiddin CJ:

This is an application for leave to appeal from the decision of the Court of Appeal under s. 96(a) of the Courts of Judicature Act 1964 (CJA).

Encik Karpal, for the applicant, formulated three questions for our consideration. However, in the course of his submission he wanted leave to be granted only on two questions, namely:

(1) Whether the Court of Appeal was right in holding the convictions of Sukma Darmawan and Dr. Munawar Anees by the Sessions Court, Kuala Lumpur and the admission of the facts read out in Court by both of them could constitute a defence of justification in respect of the offending words meriting dismissal of the applicant's suit under Order 18 rule 19 of the Rules of the High Court, 1980; and

(2) Whether the Court of Appeal was right in relying on the principle in *Lange v. Atkinson* 3 NZLR (1988) 424 and concluding the decision of the learned trial Judge on the issues of qualified privilege should not be disturbed having regard to the application to strike out the applicant's suit being one under Order 18 rule 19 of the Rules of the High Court, 1980.

We are of the view that the question of law as distilled from the above questions for the consideration of the court is whether in a defamation action the High Court can decide on the defence of justification and qualified privilege without a trial to dismiss the applicant/plaintiff's suit against the defendant/ respondent under O. 18 r. 19 RHC.

Section 96(a) CJA provides that an appeal shall lie from any judgment or order of the Court of Appeal ... involving a question of general principle decided for the first time **or** a question of importance upon which further argument and a decision of the Federal Court would be to public advantage. In *Datuk Syed Kechik bin Syed Mohamed v. The Board of Trustees of the Sabah Foundation* [1999] 1 CLJ 325 at 336 this court held that the Federal Court grants leave to appeal from the Court of Appeal sparingly and will not grant such leave unless the following criteria are satisfied by the intending appellant: (1) the judgment of the Court of Appeal has raised a point of general principle which the Federal Court has not previously decided or a point of importance upon which further argument and a decision of the Federal Court would be to public advantage; and (2) if the point is decided in favour of the intending appellant, there is a *prima facie* case for success in the appeal. Regarding criteria (2), the court observed (at p. 332) that an assessment of the prospects of success should leave be given is, of course, an important factor which the Federal Court would have to take into account. It is however not necessary for the intending appellant to demonstrate to the court the probability and a reasonable likelihood of the appeal succeeding in the event of leave being granted. All he needs to do is to show that on first impression, the appeal might succeed.

In our view, the question which we formulated above raises a question of general principle not previously decided by the Federal Court. It comes under the first criteria of s. 96(a). However, *Datuk Syed Kechik* held that the two criteria of the section is not exclusive. Hence, as assessment of the prospects of success should leave be granted is an important factor which the Federal Court would have to take into account. On this point, we note that Encik Karpal merely deposed in his supporting affidavit that "if any or all issues raised are decided in the applicant's favour, there is a *prima facie* case for success in the appeal." There was no submission made on this point to demonstrate that there a a *prima facie* case for success in the appeal.

After reading the grounds of judgment of the trial judge (see [1999] 7 CLJ Supp 32) we find he has correctly addressed the issues of justification and qualified privilege raised by the respondent in his defence. We hasten to add that he relied on the facts admitted and the confession as to the acts of gross indecency in the criminal cases involving Munawar and Sukma to found his finding that the words spoken of by the respondent constitute justification. On

qualified privilege, we also find the learned trial judge had applied the correct test and law to the facts and circumstances of the case. In fact, the correct authority on qualified privilege in the context of the respondent's defence is *Lange v. Australian Broadcasting Corporation* [1997] 189 CLR 520 and not *Lange v. Atkinson (supra).*

Therefore, in the circumstances of the case, the paramount consideration is whether the applicant would have a *prima facie* case for success should leave be granted on the question which we formulated above. Having agreed with the reasons and the conclusion of the learned trial judge on the defence of justification and qualified privilege after applying the law to the factual matrix of the case, it is our provisional view that should leave to appeal be granted, the applicant would not have any prospect of success.

It is not the practice of the Federal Court, following the English House of Lords, to give explicit reasons for granting or refusing leave (*Datuk Syed Kechik,* at p. 330). However, in the present application we think it is desirable that we should state our reasons for refusing leave although there is a point of law of general principle not previously considered and decided by the Federal Court.

Therefore, for reasons stated, we dismiss this application with costs. Deposit to be paid to the respondent to account of taxed costs.